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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 587

ETHEL M. BOESE, et al.,

Petitioners,

vs.

RANDOLPH-WELLS BUILDING CORPORATION and LA SALLE NATIONAL BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Randolph-Wells' brief (page 5) dogmatically asserts that there is no constitutional issue to be decided here. It cites for this *Beck* v. *Washington*, 1962, 369 U.S. 541, 554-55, and *Milwaukee Electric R. & Light Co.* v. *Wisconsin*, 1920, 252 U.S. 100, 106, wherein this Court observed that the Fourteenth Amendment does not "assure uniformity of judicial decisions . . . [or] immunity from judicial error . . . Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." These cases are inapposite for at bar the issue is under the Fifth Amendment and the case does not involve any claimed misapplication of state law by a state court. Most certainly this Court is interested in uniformity of decision in conformity with its own in the federal system and the elimination of error therein, particularly in the critical area of due process.

Contrary to the view of Randolph-Wells, the Court of Appeals considered that there was a "serious question" here as to whether the notice to petitioners of the pendency of the bar proceedings was sufficient to meet the standards of due process. (App. B, p. 34). The character of a case is determined by the questions involved and it has long been held that if from the questions it appears that some title, right, privilege or immunity, on which recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case is one arising under the Constitution or laws of the United States. *Starin* v. *New York City,* 1885, 115 U.S. 248, 257. No one can say with candor that the right of each petitioner to an opportunity to be heard on the bar order proceedings does not depend upon the Constitution of the United States.

In saying that the petition for certiorari presents no legal issue, it is clear that the strategy of Randolph-Wells is to engulf petitioners in the cacophonous assemblage of cases akin to those under the Federal Employers Liability Act, wherein this Court has been required laboriously to search the record to determine whether the evidence was sufficient to go to a jury, i.e. to make a second guess on the evidence and thus confer on the defeated party another hearing.

While the Court may view this as a partison claim in advocacy, the case at bar on the questions presented poses no conflict on the raw facts. It is true that in several important aspects the inferences from the facts are susceptible to different interpretations, such as whether the respondents exercised diligence in the giving of notice to the absentees on the basis of a thirty year old list of names and

addresses,[1] and, as well, the correlative question as to whether the absentees themselves were under a duty through the years up to 1961 to keep respondents informed of their whereabouts by reason of the terms of a "1930" Bondholders' Protective Agreement which was superceded, terminated and held for naught in 1936 by the approval of the plan and completion of the first bankruptcy reorganization.

But the ultimate findings on these issues are conclusions of law or, at least, a determination of mixed questions of law and fact. They are to be distinguished from findings of primary, evidenciary or circumstantial facts. *Helvering* v. *Tex-Penn Oil Co.*, 1937, 300 U.S. 481, 491. Moreover, the due process guarantee of hearing draws no distinction between questions of law and fact. *L. B. Wilson, Inc.* v. *Federal Communications Com'm.*, 1948, D.C. Cir., 170 F.2nd 793, 805.

The opinion of the Court of Appeals at bar never came to grips with the objection of petitioners that the notice was published in obscure newspapers or with the asserted defects in the notice itself, i.e. its failure to name the few absentees involved, its unintelligible message and its gross misrepresentation of what was going on. Assuming merely for argument that Randolph-Wells was diligent in mailing the notice, as found below, its publication in newspapers

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1. For Randolph-Wells (and the Court of Appeals) to call the list from which the addresses for mailing were culled a "registered list" is to give it undeserved eminence and sanctity. It was not derived from the books of the various depositaries wherein the names and addresses of holders of the certificates of deposit were to have been registered. (See Petition pp. 7-8). It was prepared in 1936, at the time the office of depositary ceased, by the last of the three depositaries to serve under the Bondholders' Agreement. It was made up from duplicate copies of the certificates of deposit on hand. It was only certified as correct with regard to certificates issued by the last depositary. (Petnrs. Exh. 4, Exh. Vol. p. 1, R. 394).

least likely to be read by the absentees and the irregularities in the notice itself are sufficient reasons, without regard to the issue of diligence, to deny the jurisdiction of the District Court over the absentees. Similar defects were held by this Court in *Schroeder* v. *New York*, 1962, 371 U.S. 208, to deprive the appellant there of due process of law. Consideration of these primary facts in the light of due process and concerning which facts there is no conflict in the record poses an issue of law and not one of fact.

Randolph-Wells states (page 4) as an inflexible rule the holding of this Court in *Mullane* v. *Central Hanover B. & T. Co.*, 1950, 339 U.S. 306, is that when the names and addresses of beneficiaries are on the books of a trustee, publication notice should be supplemented by ordinary mail to the record addresses, but when the addresses and interests of the beneficiaries are unknown, published notice is sufficient. (Citing to 339 U.S. at 317, 318). If this was all this Court said on the requirements of due process in *Mullane*, it took many words and a number of pages to reach this result. Just to mention a few observations pertinent here, this Court said that a notice must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action, it must be of such nature as to convey the required information (so they can choose whether to appear or not), and it must be given in a way that one desirous of actually informing the absentees might reasonably adopt to implement his volition. (339 U.S. at 314-15).

Abhorant to the Courts below and to Randolph-Wells is the recognition in *Mullane* that searches would be in order under the special circumstances of a particular case, this Court saying on this "Whatever searches might be required

in another situation under ordinary standards of diligence. . . ." (339 U.S. at 317). If the case at bar does not pose a situation wherein searches should be required, petitioners believe it is difficult to contemplate one that does.

Randolph-Wells and the Courts below place great weight on the fact that a copy of the District Court's bar order (without accompanying explanation) was sent to the absentees shortly after its entry on September 6, 1961. (Petnrs. Exh. 13a, Exh. Vol. pp. 61-64, R. 284). The District Court said that this cleared up the inadequacies of the notice. (App. B., pp. 50-51). Even if a person of ordinary intelligence receiving first the notice of the bar proceedings and then the bar order could discern what "was going on", or better yet, what had transpired, it makes no difference for the law is that an essential element of due process is the opportunity to be heard before the reaching of a judgment, and that a judgment without an opportunity to be heard is judicial oppression. *Galpin* v. *Page,* U.S. 1873, 18 Wall. 350, 368-69, 21 L.ed 959, 963. Also, as stated on page nineteen of the petition here, the sending out of the bar order could not retroactively supply constitutional validity to the notice upon which the bar proceedings stands or falls.

No matter how Randolph-Wells would like to have it, there is no inflexible formula for gauging due process. *Walker* v. *Hutchinson,* 1956, 352 U.S. 112, 115. It is for this reason that issues such as the one at bar are not easy of solution and may not be varnished over with a simple application of headnote generalities. In *Schroeder,* supra, this Court said, "As was emphasized in Mullane, the requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process—

the right to be heard." (371 U.S. at 212).[2] The practical effect of the decisions below is to eliminate the requirement that some reasonable effort be made to notify parties of the pendency of proceedings affecting them. The decisions below convert due process into a meaningless gesture, a feint. It is vital then that this Court review this case in which the facts are so in contrast to anything previously considered by it, and particularly so for future guidance to litigants caught in a similar web of nice sounding legal generalities and who, otherwise, may never obtain equal justice under the law, notwithstanding valiant efforts to that end. This Court has stated that it stands ready to correct violations of constitutional rights. *United States* v. *Handy*, 1956, 351 U.S. 454, 462. Violations abound at bar. Question 1 submits a case, petitioners believe, "within the indispensable area of this Court's jurisdiction."

As petitioners interpret Randolph-Wells' rejoinder to their argument on question 2, it amounts to a concession that the $96,000 deposited by it with the trustee, LaSalle, was pursuant to its voluntary reorganization and not, therefore, a distribution under the plan of reorganization. The use by Randolph-Wells of Section 204 of the Chandler Act to implement its voluntary reorganization is a perversion of the purpose of the Act and the intent of Congress. This should not be tolerated. Randolph-Wells' refusal to be-

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2. Amazing as it is, the bar proceedings were underway for five months before any notice was given the absentees (R. 134, 168), during which period the District Court had under advisement on briefs critical issues as to its power to open up the 1939 reorganization and whether the $96,000 deposited with LaSalle was a trust fund for the absentees or an indemnity deposit. (R. 149). Petitioners never had an opportunity to be heard on these issues. The notice given stated that the hearing on the bar petition would be September 6, 1961, and the Court pre-empted this hearing by its opinion and order of August 30, 1961, deciding the first issue unfavorably to the absentees. (R. 170, 188a).

come involved in question 3 is honed perhaps from a desire to avoid exposure on this front.

CONCLUSION

For the reasons expressed herein and in the petition, a writ of certiorari should issue.

Respectfully submitted,

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